

APR 16 1979

MICHAEL RODAK, JR., CLERK

No. **78-1691**

**In The
Supreme Court of the
United States**

October Term, 1979

QUINTEN T. STARREN, *Petitioner*

VS.

HILDA I. STARREN, *Respondent*

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA**

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April 12, 1979

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The petitioner, QUINTEN T. STARREN, respectfully prays that a Writ of Certiorari issue to review the order of the Supreme Court of the State of California in the above-entitled case.

OPINION BELOW

The judgment and opinion of the Court of Appeals of the State of California, Fourth Appellate District, entered in this proceeding on October 30, 1978, appears in Appendix B herein. On January 17, 1979, the Supreme Court of California denied petitioner's Petition for Hearing.

JURISDICTION

The October 30, 1978, judgment of the Court of Appeals of the State of California, Fourth Appellate District affirmed the

trial court. On November 27, 1978, the same Court of Appeals filed a denial to petitioner's/appellant's petition for rehearing. A timely petition for hearing to the Supreme Court of the State of California was denied on January 17, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. When a court gives retrospective effect to a court decision by declaring that a property settlement agreement executed four years prior to the court decision is deemed rescinded because of "mutual mistake of fact or law," has the federal constitutional right against impairment of contract been violated?
2. Whether under the Supremacy Clause an award of petitioner's military retirement benefits to non-service related respondent impermissibly conflicts with the Retired Serviceman's Family Protection Plan?

HOW THE FEDERAL QUESTION IS PRESENTED

In the instant case the trial court on October 27, 1976, gave effect to a 1976 California Supreme Court decision (*In re Marriage of Brown*, (1976) 15 C.3d 838) which held that *unvested* retirement benefits were community property. Such effect was given by a finding that a 1972 property settlement agreement filed with the trial court did not contract relative to such retirement benefits and was subject to division by the court as a community assets. (Appendix A, *infra*, pages A3-A5.)

The Fourth District Court of Appeals reviewed the record for "substantial evidence" to support the trial court's decision. The court affirmed the trial court's decision that such benefits were community property and held that "since neither of the parties

knew the unvested pension was a community property asset when stipulating to the property agreement, the contract was made while each was laboring under a mutual mistake of fact or law. This warrants rescission." (Appendix B, *infra*, pages A8-A9.)

The same Court of Appeals filed a denial of petitioner's petition for rehearing. The Supreme Court of the State of California denied the petition for hearing. Petitioner at both levels, appellate and supreme, raised the violation of both the state and federal constitutional rights against impairment of contracts when the *Brown* decision (declaring unvested retirement benefits community property) was given retrospective effect. (Appendix C, *infra*, pages A11-A13, and Appendix D, *infra*, page A15.)

On February 17, 1979, petitioner's motion to recall remittitur was denied by the same Court of Appeals. The motion was based on the ground that military retirement benefits are not community property, rather the separate property of the military person who earned them. (Appendix E, *infra*.)

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 10:

§1440. Annuities not subject to legal process. "No annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process."

2. United States Code, Title 42:

§659(a) Enforcement of individual's legal obligations to provide child support or make alimony payments—United States and District of Columbia to be subject to legal process.

"Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based

upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments."

3. Certain Social Security Act Amendments, Title V:

§501(d). Definitions: Section 462 For Purposes of Section 459.

"(c) The term 'alimony,' when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."

STATEMENT OF THE CASE

The STARRENS were married in 1946 and had been separated for a full 10 years before petitioner, QUINTEN, filed a petition for dissolution of marriage on September 10, 1971, to which a

response was thereafter filed on September 20, 1971, by respondent, HILDA. On December 20, 1971, the parties filed a stipulation which provided "that petitioner be awarded the life insurance, (retirement) and the commercial account." On January 6, 1972, the parties filed the identical stipulation filed on December 20, 1971, except that the matter was heard on the response and the petition was to be withdrawn, and the stipulation contained no comma after the word "insurance" and no parentheses marks around the word "retirement."

In January, 1976 a nonvested retirement like petitioner's was declared a community asset subject to division in a dissolution proceeding. (*In re Marriage of Brown*, 15 C.3d 838.)

Because respondent obtained an improperly entered interlocutory judgment of dissolution of marriage on October 29, 1973, the case was not heard until September 3, 1976. The trial court on October 27, 1976, found the wording "life insurance retirement" ambiguous and admitted extrinsic evidence. The court found petitioner's retirement pay had not been included in the agreement and divided the pay as a community asset as follows: Petitioner received as his sole and separate property 76.53% of his gross monthly Navy retirement, and respondent received as her sole and separate property 23.47% of petitioner's gross monthly Navy retirement.

The Court of Appeals of the State of California, Fourth Appellate District affirmed the trial court's judgment on October 30, 1978, holding that since neither of the parties knew the unvested pension was a community property asset when stipulating to the property agreement, the contract was made while each was laboring under a mutual mistake of fact or law and the court rescinded the contract. On November 27, 1978, the same court filed a denial to petitioner's/appellant's petition for rehearing.

The California Supreme Court denied a timely petition for hearing on January 17, 1979. On February 19, 1979, petitioner's motion to recall remittitur, based upon the fact that military retirement benefits are the separate property of the employee, was denied by the same Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. THE FEDERAL CONSTITUTIONAL RIGHT AGAINST IMPAIRMENT OF CONTRACTS WAS VIOLATED WHEN THE STATE DECISION (*IN RE MARRIAGE OF BROWN*) WAS GIVEN A RETROSPECTIVE EFFECT SUCH THAT A PROPERTY SETTLEMENT AGREEMENT EXECUTED FOUR YEARS PRIOR TO THIS DECISION WAS (BY COURT DECREE) RESCINDED.

Petitioner contends the property settlement agreement filed January 6, 1972, constituted a valid contract, and that the subsequent court rescission of the contract, although not requested by either petitioner or respondent, impaired the obligation of a valid contract.

Sanctity of contracts has a long and sacred period of reliance, so sacred, in fact, that it is enacted in the California Constitution, Article I, §16. The case of *Cooley v. Calaveras County*, (1898) 121 C. 482, holds that the subsequent determination of a question of law by judicial decision does not create such a mistake of law as courts will rectify, nor can it have retroactive effect to overturn the settlement which was valid when made. In *Bradley v. Superior Court*, (1957) 48 C.2d 509, the Court at 519 stated:

"Neither the court nor the legislature may impair the obligation of a valid contract (Cal. Const., Art. I, §§1, 16), and a

court cannot lawfully disregard the provisions of property settlement agreements or deny to either party his rights thereunder."

In *Bodle v. Bodle*, (1978) 76 Cal.App.3d 758, a case also involving a marital settlement agreement, the Court at 766 stated:

"These 'contractual' 'property' rights of the Bodles may not be impaired lest a constitutional nerve be touched."

Such retroactivity of the *Brown* decision, when there has been a final disposition of property in a contract between the parties is violative of the constitutional right against impairment of obligations of contract. Although raised by petitioner in the petition for rehearing, the subsequent denial by the Fourth District Court of Appeals did not address this constitutional issue. The District Court in its decision stated:

"Since neither of the parties knew the unvested pension was a community property asset when stipulating to the property agreement, the contract was made while each was laboring under a mutual mistake of fact or law. This warrants rescission."

The federal constitutional right against impairment of contracts is enacted in the United States Constitution, Article I, §10, Clause 1. The historical importance of the impairment of contracts is illustrated by the following cases:

In the case of *Douglass v. Pike County, Missouri*, (1880) 101 U.S. 677, the Supreme Court at 687 stated:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction,

the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

In *Columbia Railway Gas & Electric Company v. State of South Carolina*, (1923) 261 U.S. 236, the Supreme Court at 245 stated:

"But, although the state court may have construed the contract and placed its decision distinctly upon its own construction, if it appear, upon examination, that in real substance and effect, force has been given to the statute complained of our jurisdiction attaches."

In *U.S. ex rel. Vermont Inv. Co. v. City of Cocoa*, (1936), 17 F.Supp. 59, the district court in regard to U.S. Constitution, Article I, § 10, at 60 stated:

". . . , but I am of the opinion that the spirit of such constitutional prohibition should govern the courts as well as legislative bodies, and that the court should never put its seal of judicial approval on any attempt to impair the obligation of contracts."

In *Brown-Crummer Inv. Co. v. Town of North Miami*, (1935) 11 F.Supp. 73, the district court at 76 stated:

"A state judicial decision can no more impair the contract in question than can a legislative act."

In comparing the state and federal case law cited above, the two state cases involved property settlement agreements between spouses, whereas the federal cases involved land or public/commercial bonds. In the two cited state cases no state statutes were involved, whereas the federal cases involved state court decisions

of state statutes or legislation. Neither the cited state nor federal cases involved federal statutes.

Based on these state and federal cases, in the instant case the state constitutional issue of impairment of contract is more direct and explicit than the federal issue of impairment of contract. As in the instant case, *Bradley and Bodle* involved state court decisions regarding the state constitutional issue of impairment of contracts (that is, impairment of property settlement agreements) although no state statutes were at issue. Conversely, in the cited federal cases state court decisions of state statutes which impaired contracts were at issue. Nevertheless, the issue of impairment in the instant case at either the state or federal level cannot and does not arise without the state characterization of military retirement benefits as community property. In essence, the federal question of impairment of contract is not directly at issue (although as in *Vermont Inv. Co.* the spirit of federal impairment is in issue), but the state characterization of these benefits as community property presents a direct federal question. It is the characterization of these federal benefits by the state as community property which constitutes the very reason for this petition. It is petitioner's position that military retirement benefits are the separate property of the employee spouse, absent additional Congressional action or direction.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE INTENT OF CONGRESS THAT MILITARY RETIREMENT BENEFITS REMAIN THE SEPARATE PROPERTY OF THE EMPLOYEE SPOUSE.

2.1. Various California cases have held that federal military retirement pay is community property: *French v. French*, (1941) 17

C.2d 775; *In re Marriage of Karlin*, (1972) 24 Cal.App.3d 25; *Bensing v. Bensing*, (1972) 25 Cal.App.3d 889; *In re Marriage of Brown*, (1972) 27 Cal.App.3d 188; *In re Marriage of Fithian*, (1974) 10 C.3d 592.

2.2. In *Hisquierdo v. Hisquierdo*, (1979) No. 77-533, 39 CCH S.Ct.Bull., p. 8860, the United States Supreme Court held that retirement benefits provided by the Railroad Retirement Act of 1974 may not be divided under the community property law and are payable only to the person who earned said benefits. Here, the military retirement pay of petitioner is statutorily similar to the retirement benefits provided by the Railroad Retirement Act. In *Hisquierdo* it was held that ordering petitioner to pay respondent an appropriate portion of his benefits, or its monetary equivalent, would deprive petitioner of a portion of the benefit Congress in 45 USC § 231(c)(3) indicated was designed for the railroad employee alone. Similarly, in the instant case, petitioner's military retirement benefits have been historically and deliberately safeguarded and earmarked by Congress for the military employee. In various legislative sessions Congress has carefully avoided defining or characterizing military retirement benefits as a community asset divisible upon divorce. Congress has adhered to this historical policy as follows:

(1) 10 USC § 1440 prescribes that no annuity payable under this subchapter (*i.e.*, Retired Serviceman's Family Protection Plan) is assignable or subject to execution, levy, attachment, garnishment, or other legal process. The legislative history and Congressional intent of the Armed Forces Retirement Annuities is presented in S.Rep. No. 1480, 90th Cong. 2d Sess. (1968), 1968 U.S. Code Cong. and Adm. News at 3294 (Public Law 90-485). Here, Congress at 3300 said: "Historically, military retired pay

has been a personal entitlement payable to the retired member himself as long as he lives."

(2) This Congressional intent of S.Rep. No. 1480 was further demonstrated in S.Rep. No. 92-1089, 92nd Cong. 2d Sess. (1972), 1972 U.S. Code Cong. and Adm. News at 3289 (Public Law 92-425). Here Congress eliminated the attachment provision of up to 50 percent of the retired pay of a member of the uniformed services to comply with the order of a court in favor of a spouse, former spouse, or dependent children. (This S.Rep. specifically did not cover ex-wives in a system of survivor benefits.) Congress thought that it would be unfair to make an exception of retired military pay by providing that it alone, among federal pays and annuities, would be subject to attachment.

(3) Further, S.Rep. No. 95-1084, 95th Cong. 2d Sess. (1978), 1978 U.S. Code Cong. and Adm. News at 2785 (Public Law 95-366) authorized the Civil Service Commission to comply with the terms of a court decree, order, or property settlement in connection with the divorce, annulment, or legal separation of a federal employee, who is under the Civil Service Retirement System. However, no similar attachment of retired military pay was authorized.

In *Hisquierdo* the reliance on 45 USC § 231(m) is substantially similar and equivalent to the statutory language of 10 USC § 1440 in that § 1440 is a most important part in the statutory military retirement scheme. The very language and purpose of § 1440 is to ensure that the benefits actually reach the beneficiary and thus pre-empts all state law that stands in its way. Here, the community property interest that respondent seeks

conflicts with § 1440, promises to diminish that portion of the retirement benefit Congress has said should go to the retired military employee, and thus causes the kind of diminution to federal interests that the Supremacy Clause pre-empts. It is not for state courts to impair a benefit that Congress has specifically earmarked for the retiree.

2.3. 42 USC §659(a) effective January 1, 1975, provided that moneys payable by the United States to any individual, including members of the armed services, shall be subject to legal process against such individual of his legal obligations to provide child support or make alimony payments. In 1975, Congress made an exception in all federal benefit plans whereby Congress amended the Social Security Act by adding a new provision, § 459, to the effect that notwithstanding any contrary law, federal benefits may be reached to satisfy a legal obligation for child support or alimony. 88 Stat. 2357, 42 USC § 659. In 1977, Congress added to the Social Security Act a definitional statute, § 462(c), which relates to § 459 and limits "alimony" to its traditional common-law meaning of spousal support. That statute states specifically that "alimony"

"... does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." Public Law 95-30, Tit. V, § 501 (d), 91 Stat. 160.

The choice of Congress to exclude a "property" definition within the "alimony" definition was deliberate. Congress has spoken with clarity and distinction, and the statutory language protects the choice to exclude "property" from the definition within "alimony." This definitional section shields the distribu-

tion of military retirement benefits from state decisions that otherwise reverse the flow of retirement payments Congress has historically intended for the military employee.

The 1977 amendments to the Social Security Act by amending the existing § 459 and adding the new definitional statute § 462 (c), expressly override § 1440, and even facilitate attachment and garnishment for claims based on spousal support, but deliberately decline to do so for community property claims. As Congress has specifically refrained from defining military retirement benefits as "property," any such division by the states in a dissolution of marriage creates property rights to these benefits that do not exist under federal law, and thus conflicts with federal law.

In support of this separate property argument petitioner offers the decision in *Ellis v. Ellis*, (1976) 552 P.2d 506, where the Supreme Court of Colorado, en banc, held that the fact that military retirement pay is subject to garnishment does not make it "property" subject to division in a dissolution of marriage proceeding. As authority the Colorado Court cited the same Social Security Act, § 459, and 42 USCA § 659, which is similarly cited in the instant petition.

2.4. It is petitioner's contention that the Congressional intent to disregard the community characterization of military retirement benefits and characterize such benefits as separate property is primarily based on the previous considerations. However, other considerations indicating a Congressional disregard for a community property characterization are as follows:

(1) Spouse Ignored. The federal military retirement statutes (Title 10 USC Chapter 73: Annuities Based on Retainer

Pay; Survivor Benefit Plans) ignore community property. The statutes contain no words such as "child," "wife" or "administrator" indicating a family relationship. The statutes provide for the conditions of retirement, the mode of retirement, and the methods for calculating retired pay, however, they do not refer to, let alone provide for the spouse of the retiree.

(2) Right of Testamentary Disposition. In settling the accounts of pay of a deceased member of the armed services, a military person, before death, may designate whomever he desires as his beneficiary, (10 USC § 2771). This right gives the serviceman a power of testamentary disposition similar to that under the general laws of most states. This right cannot be made illusory by allowing recovery of said pay by a person other than the designated beneficiary. If such pay were community property, the serviceman could not summarily deprive a spouse, or ex-spouse, of the interest in such pay. But since it is his personal entitlement, he can.

(3) Spousal Provisions. The Retired Serviceman's Family Protection Plan, (Title 10 USC Chapter 73, Subchapter I: Retired Serviceman's Family Protection Plan, § 1434-1435) provides for an annuity to a "widow" (that is, a woman who survives as his wife, not his surviving ex-wife) of the serviceman as a "qualified beneficiary," but not to a surviving ex-wife, and provides for the cessation of reduction from the retired pay if and when a "qualified beneficiary" ceases to be qualified because of a divorce.

(4) Ex-Wives vs. Widows. In adopting the Survivor Benefit Plan (Title 10 USC Chapter 73, Subchapter II: Survivor

Benefit Plan), Congress was primarily concerned in protecting the serviceman's widow. Under the Plan the annuity to the serviceman's widow is terminated or suspended by her remarriage (10 USC § 1450). But if retired pay is community property, the ex-wife, whom Congress deliberately neglected, is treated better than the widow, whom Congress for certain purposes expressly protected. Such a result is not logical and it is therefore more probable that Congress did not intend that ex-wives were to have a community property right in the retired pay.

Petitioner in this writ argues the same conclusion reached by Judge B. Abbott Goldberg in his January-February 1973 article, Vol. 48, No. 1, California State Bar Journal 12, "Is Armed Services Retirement Pay Really Community Property?", which, at page 91, states:

"Nothing has been found to indicate that Congress has ever considered treating retired military pay as community property and thereby imposing an obligation on the retiree unlimited by his ex-wife's need for support either in duration or amount. Congress' recent action confirms the inferences to be drawn from the earlier actions and statements, that retired pay is indeed a personal entitlement of the retiree, which accrues only to him, and in which his wife has no rights except as Congress gives them to her."

Petitioner in this writ contends that since Congress has given no property interest to the non-employee spouse in the employee spouse's military retirement benefits, that she in fact has no property rights in these benefits.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of California, Fourth Appellate District, and the subsequent denial of petition for hearing by the Supreme Court of the State of California.

Respectfully submitted,

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APPENDIX A

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Filed North County Branch, October 27, 1976

Robert D. Zumwalt
Clerk

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY OF
SAN DIEGO

In re the Marriage of:
QUINTEN T. STARREN, *Petitioner*
and
HILDA I. STARREN, *Respondent*

No. D 56045
SUPPLEMENTARY INTERLOCUTORY JUDGMENT
OF DISSOLUTION OF MARRIAGE

This matter came on regularly to be heard in Department 16 of the above entitled Court, the Honorable EDWARD T. BUTLER, Judge Presiding on September 2, 1976 and again on September 21, September 30 and October 14, 1976. Hearings on September 30, 1976 and October 14, 1976 were in Department C, North County Branch.

Appearances were as follows:

September 3, 1976: Petitioner not present but appearing by and through his attorney, NORVIN GRAUF. Respondent present and appearing in person and by and through her attorneys, ARTHUR J. JOHNS and JOHN J. BRYAN.

September 21, 1976: Petitioner present and with his attorney, NORVIN GRAUF. Respondent present and by and through her attorneys ARTHUR J. JOHNS and JOHN J. BRYAN.

September 30, 1976: Petitioner not present but appearing by and through his attorney, NORVIN GRAUF. Respondent present and by and through her attorneys ARTHUR J. JOHNS and JOHN J. BRYAN.

October 14, 1976: Petitioner not present but appearing by and through his attorney, NORVIN GRAUF. Respondent present and by and through her attorney ARTHUR J. JOHNS.

Upon a review of the entire file of this case, the opinion of the Court of Appeal, a review of Appellant's opening brief, Respondent's opening brief and Appellant's reply brief as presented by the parties to the Court of Appeal (the review of the briefs by the Court being stipulated and agreed to by the parties hereto) the testimony presented on the issues to this Court, and for good cause appearing therefor, the Court does hereby make the following findings of fact and conclusions of law:

1. The marriage of the parties has previously been dissolved by Interlocutory Judgment entered October 29, 1973 and Final Judgment entered January 4, 1974. The issues before this Court now are only the division of community property, spousal support and attorneys fees.

2. The original Petition filed by Petitioner for Dissolution of his marriage does not contain as a community asset subject to division by the Court the Navy Retirement benefits of Petitioner. Further, the Response initially filed by Respondent similarly does not contain the Navy retirement benefit of Petitioner as a community asset subject to division by the Court.

3. The stipulation entered into by the parties and filed herein on January 6, 1972 is ambiguous in regard to paragraph 4 in that Petitioner's Navy retirement was not contemplated by the parties as a community asset, said retirement is not incorporated in paragraph 4, and paragraph 4 does not award to Petitioner his Navy retirement as his sole and separate property.

4. Inasmuch as paragraph 4 of said stipulation fails because it is ambiguous the remainder of the stipulation cannot, in order to achieve an equitable result, be enforced as against either party.

5. Said Stipulation in its entirety must be disregarded because Petitioner believed the Stipulation assigned to him the Navy retirement and he would not have contracted with respect to spousal support as he did had he not so believed.

6. Petitioner served in the U. S. Navy and retired after 30 years (360 months) of Naval service on December 1, 1972. From the date of marriage until the date of separation of the parties, the marital status was for a duration of 14 years one month (169 months) during all of which period the Petitioner

was on active duty in the U. S. Navy. The community property interest in Petitioner's Navy retirement is, therefore, 46.94%, to one-half of which Respondent is entitled as her sole and separate property, namely, 23.47% of the gross monthly retirement benefit received by Petitioner.

7. Respondent's entitlement to 23.47% of Petitioner's gross monthly retirement accrues on and after January 1, 1973 and Respondent is entitled to this percentage from that date. As of October 1, 1976, the amount due to Respondent is 46 (months) times 23.47% of the gross amount received by Petitioner.

8. In order to determine the exact monetary amount set forth above, Petitioner's attorney must furnish Respondent's attorney with appropriate documentation showing Petitioner's gross monthly retirement receipts from on and after January 1, 1973.

9. Upon the determination of the monetary amount due and owing to Respondent, a judgment shall be entered in favor of Respondent in that amount.

10. In order to insure compliance by the parties to the orders made herein, the court shall retain jurisdiction in the matter of spousal support and the Navy retirement and shall order an appropriate assignment of wages for collection thereof.

11. The parties have previously disposed of all other community assets in this case.

12. Respondent's attorney is entitled to fees as and for the additional services performed in this matter, and in addition to amounts previously paid.

Accordingly, and for good cause appearing therefor, the Court, does hereby: ORDER, ADJUDGE AND DECREE:

1. The marriage of the parties has previously been dissolved.

2. The stipulation of the parties, filed herein on January 6, 1972, is invalid and unenforceable and the terms of said stipulation are unfair and inequitable as against Respondent and it is, therefore, disapproved.

3. Petitioner is awarded as his sole and separate property 76.53% of his gross monthly Navy retirement from on and after January 1, 1973.

4. Respondent is awarded as her sole and separate property 23.47% of Petitioner's gross monthly Navy retirement from on and after January 1, 1973.

5. Petitioner's attorney shall deliver to Respondent's attorney on or before December 1, 1976 such documentation regarding the monetary amounts received monthly by Petitioner from on and after January 1, 1973, from the U. S. Navy as his gross retirement to determine arrearages due to Respondent.

6. A judgment in favor of Respondent in the amount due and owing to Respondent as her share of the Navy retirement shall be entered against Petitioner as a Supplemental Judgment herein.

7. Petitioner is ordered to pay forthwith 23.47% of his gross monthly Navy retirement to Respondent and is further ordered to execute an assignment, as an assignment of wages, in favor of Respondent of this percentage.

8. The Court retains jurisdiction regarding performance of the orders set forth in paragraphs 5, 6, and 7, above.

9. Petitioner shall pay to Respondent, as and for her spousal support the sum of one (\$1.00) Dollar per year until further order of the court.

—A6—

10. The other community assets, as set forth in the Petition and Response, have been divided by the parties and each party shall retain, as their respective sole and separate property, those assets in their possession.

11. Petitioner shall pay to Respondent's attorney, as and for additional attorney's fees, the sum of \$750.00 forthwith.

DATED: October 27, 1976.

JUDGE OF THE SUPERIOR COURT
EDWARD T. BUTLER

—A7—

APPENDIX B

COURT OF APPEAL—FOURTH DIST.

FILED October 30, 1978

Robert L. Ford, Clerk

Gale Ondler, Deputy Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

In re: MARRIAGE OF STARREN
QUINTEN T. STARREN, *Appellant*,

v.

HILDA I. STARREN, *Respondent*.

4 Civ. No. 16339
(Superior Court No. D-56045)

APPEALS from orders and a judgment of the Superior Court of San Diego County. Edward T. Butler, Paul Eugene Overton and Wesley B. Buttermore, Jr., Judges. Affirmed in part; vacated in part.

Quinten T. Starren appeals the judgment dividing his military retirement pay and the orders awarding his former wife, Hilda, temporary spousal support of \$250 per month during the appeal and allowing assignment of his wages to fulfill the temporary support order.

On January 6, 1972 the Starrs filed a stipulated property settlement which included the provision:

"4. That Petitioner [Quinten] be awarded the life insurance retirement and the commercial account.

Four years later Quinten's unvested military pension was declared to be community property (*In re Marriage of Brown*, 15 Cal. 3d 838.) Hilda claims this asset was omitted from the property settlement and should now be divided between them; Quinten argues his pension was awarded to him under clause 4 of the stipulation. The trial court properly found the wording "life insurance retirement" ambiguous, it being unclear what kind of benefit this referred to, and admitted extrinsic evidence. Where, as here, this evidence is conflicting the appellate court reviews the record for substantial evidence to support the trial court's decision. (6 Witkin, *California Procedure*, Appeal, §258.) The trial court found Quinten's retirement pay had not been included in the agreement and divided it equally between the parties (Civ. Code §4800).¹ Quinten testified he did not list his Navy retirement on the petition for dissolution because it was not yet an asset. At the time the support agreement was drawn up, unvested retirement benefits were not considered to be property and it is reasonable to

FOOTNOTE 1: Not really equally since only 46.94% of the pension accrued during the marriage so Hilda's ownership interest is 23.47%.

infer they would not be included in a property settlement. Hilda's counsel said he never discussed the Navy pension. This is substantial evidence to support the trial court's conclusion the parties did not include the pension in the settlement agreement.

Since neither of the parties knew the unvested pension was a community property asset when stipulating to the property agreement, the contract was made while each was laboring under a mutual mistake of fact or law. This warrants rescission. Hilda owns one-half of the retirement benefits accrued during marriage and is entitled to 23.47% of the monthly payments from January 1, 1973 on. In equity, any support payments made after that date under the separation agreement and the temporary support order should be offset against the retirement benefits due her. Future payments can be made directly to Hilda from the pension fund (*Jobns v. Retirement Fund Trust of the Plumbing, Heating & Piping Industry of Southern California*, Cal. App. 3d). In addition, we award spousal support of \$1 a year (see *In re Marriage of Morrison*, 20 Cal. 3d 437).

In view of this it is unnecessary to consider the propriety of the support order and the assignment of wages.

The judgment is affirmed; the orders are vacated.

Brown

P.J.

WE CONCUR:

Cologne

J.

Staniforth

J.

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

FILED November 27, 1978

Robert L. Ford, Clerk

R. J. Smith

Deputy Clerk

IN RE: MARRIAGE OF QUINTEN T.
and HILDA I. STARREN.

4 Civil No. 16339

SUPERIOR COURT NO. D 56045

BY THE COURT:

The petition for rehearing is denied.

Copies to: Norvin L. Grauf, Esq.-SD
Bryan & Johns-Chula Vista
Superior Court-SD

Brown

Presiding Justice

APPENDIX C

PORTION OF APPELLANT'S OPENING BRIEF TO THE
DISTRICT COURT OF APPEALS

The only relevant case decided prior to the date of their property settlement agreement was *French v. French* (1941) 17 Cal.2d 775. In that case the court held that retired pay was community property, but the same was not divisible before the serviceman was eligible to retire because not yet "vested" and still an "expectancy." Appellant was in the U. S. Navy and had been in that service for 28 plus years prior to the time the action was filed, and was still in that service when the action was filed and the agreement was negotiated. (R.T. Vol. II 16 lines 8-16; 17 lines 1-16.) Therefore, unlike the *French* case, *supra*, the parties negotiated a retirement benefit already vested as to a 20-year retirement, (R.T. Vol. II 14 lines 1-5; 17 lines 19-21) and an expectancy of a 30-year retirement (R.T. Vol. II 21 lines 4-8). Appellant, after retirement on December 1, 1972, drew retirement benefits. (R.T. Vol. II 16 lines 15 and 16; 14 lines 14-21; 15 lines 16-18.) Court decisions holding that military retirement pay is community property should not be given retroactive effect such that property settlement agreements fairly negotiated prior to the decisions could be disapproved. Such retroactive effect was given by the Trial Court when the property settlement agreement was disapproved and set aside insofar as the same pertained to retirement pay. Such retroactive effect is itself unfair.

In *Chicot County Drainage Dist. v. Baxter State Bank* (1939) 308 U.S. 371, the United States Supreme Court stated as follows:

"The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County*, 118 U.S. 425, 442; *Chicago I. & L. Ry. Co. v. Hackett*, 228 U.S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such determination, is an operative fact and may have consequences which cannot justly be ignored. *The past cannot always be erased by a new judicial declaration.* The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and corporate, and particular conduct, private and official. *Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.* These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a *principle of absolute retroactive invalidity cannot be justified.*" (Emphasis mine.)

It has been held that parties who have entered into contracts relying upon a previous decision of the State Supreme Court are not relieved of their obligations because of a subsequent decision by the same court in another case, overruling the former one and declaring a different rule on the same subject. *Allen v. Allen* (1892) 95 C. 184.

As stated in 13 Cal.Jur.3d §295 at page 546:

"A Court cannot legislate, and any attempt on its part to do so is an individual infringement upon the legislative function. This limitation applies with peculiar force where by so doing the action of the court operates to deprive citizens of their vested rights, or impairs the obligation of contracts. *Beckman v. Skaggs*, 59 C. 541; *Lux v. Haggin*, 69 C. 255."

From the foregoing it is apparent that the decisions of this state hold that in the absence of fraud or compulsion the trial court must approve property settlement agreements as the same pertain to division of property. Further, if the stipulation awarded the Navy retirement to appellant, it is apparent that, even if these cases were not controlling, the trial court's failure to approve the property settlement agreement because of court decisions on military retirement pay decided subsequent to the contract is, in effect, an abridgement of freedom of contract and an attempt to impair the obligation of contracts. If the courts consistently determined fairness of a contract based on every court decision subsequently rendered, no contract negotiated in this state is or will be safe from the claim of unfairness.

APPENDIX D

PORTION OF APPELLANT'S PETITION FOR HEARING
TO THE CALIFORNIA SUPREME COURT
IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

In re: Marriage of QUINTEN T.
and HILDA I. STARREN

QUINTEN T. STARREN, *Petitioner and Appellant*,
vs.

HILDA I. STARREN, *Respondent and Respondent*.

PETITION FOR HEARING

To the Honorable ROSE BYRD, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the State of California:

Appellant hereby petitions for a hearing to consider the decision of the Court of Appeals of the State of California, Fourth Appellate District, filed in this action on October 30, 1978, affirming the judgment of the Trial Court. A copy of the decision of the Court of Appeals is set forth herein as Appendix "A."

Hearing by this Court is necessary on the ground that an important question of law is at issue herein which requires settlement by this Court. In support thereof, the following points are submitted:

POINT ONE

Constitutional rights (both federal and state) are violated when the Court decision of *In re Marriage of Brown*, (1976) 15 Cal. 3d 838, is given retrospective effect such that a property settlement agreement fairly negotiated 5 years prior to that decision is deemed (by court decree) rescinded because of a "mutual mistake of fact or law."

CLERK'S OFFICE, SUPREME COURT

4250 State Building

San Francisco, California 94102

January 17, 1979

I have this day filed Order.....

HEARING DENIED

In re: 4 Civ. No. 16339

Marriage of Starren

Respectfully,

G. E. BISHEL

Clerk

Recd. 1-22-79

APPENDIX E

IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

No. 4 Civ 16339

MOTION TO RECALL REMITTITUR
COURT OF APPEAL—FOURTH DIST.

FILED February 2, 1979

Robert L. Ford, Clerk

In re: Marriage of QUINTEN T.
and HILDA I. STARREN

QUINTIN T. STARREN, *Appellant*,

vs.

HILDA I. STARREN, *Respondent*.

To respondent, HILDA I. STARREN, and ARTHUR J. JOHNS,
her attorney of record in this action.

PLEASE TAKE NOTICE that appellant QUINTEN T.
STARREN, hereby moves the above-entitled Court to recall the
remittitur issued in this case on the following ground:

To correct a mistake of fact, which mistake both the Trial and
Appellate Courts made in rendering their respective decisions.
Said mistake of fact was and is that military retirement benefits
afforded by federal statutes are community property, whereas in
truth and fact said military retirement benefits are the separate
property of the military person who earned them.

This motion is made on the declaration of NORVIN L.
GRAUF, and the memorandum of points and authorities filed
and served with this motion, and on the record on appeal.

Dated: February 2, 1979.

Norvin L. Grauf, Attorney for
Appellant

IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

No. 4 CIV 16339
DECLARATION IN SUPPORT OF MOTION
TO RECALL REMITTITUR

In re: Marriage of QUINTEN T.
and HILDA I. STARREN

QUINTEN T. STARREN, *Appellant*,
vs.
HILDA I. STARREN, *Respondent*.

I, NORVIN L. GRAUF, say that:

1. I am the attorney for the appellant, and I make this declaration in support of the motion for an order recalling the remittitur.

2. On January 17, 1979, the California Supreme Court denied appellant's petition for hearing to consider the decision of this Court filed in this action on October 30, 1978. A remittitur issuing from this Court was received by the Superior Court of San Diego County and entered on January 22, 1979, in Book 1199, Page 274. On the same date, January 22, 1979, the United States Supreme Court decided *Jess H. Hisquierdo, Petitioner, v. Angela Hisquierdo*, No. 77-533, 39 CCH S.Ct.Bull. P. B860, which decision held that retirement benefits provided by The Railroad Re-

tirement Act of 1974 may not be divided under the community property law and are payable only to the person who earned said benefits. The military retirement pay of appellant in analogous to the retirement benefits provided by the Railroad Retirement Act of 1974, and based upon the reasoning of said *Hisquierdo* case may not be divided under the community property law, and is payable only to the person who earned said pay. In this case, the appellant is the person who earned said pay. On the dates when the trial Court and this Court rendered their respective decisions, the United States Supreme Court had not determined the *Hisquierdo* case. The rationale of both the Trial Court and this Court in rendering their respective decisions was that a mistake of fact or law had been made by the appellant and respondent when entering into and executing their property settlement agreement in this case, that mistake of fact and law being that military retirement pay of appellant was the separate property of the appellant. The *Hisquierdo* case indicates by strong analogy, that there was no mistake of fact or law. Since a remittitur can be recalled "to correct a mistake of fact" and/or when an order was "improvidently made," this Court has the power to review "judicial" matters. A recall of the remittitur and a review of this case in light of *Hisquierdo* case would serve the ends of justice as well as economize the time and expense to appellant by requiring its review by the United States Supreme Court.

Executed on February 2, 1979, at San Diego, California.

I declare under penalty of perjury that the above is true and correct.

Norvin L. Grauf, Attorney for
Appellant

IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

No. 4 CIV 16339

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO RECALL REMITTITUR

In re: Marriage of QUINTEN T.
and HILDA I. STARREN

QUINTEN T. STARREN, *Appellant*,

vs.

HILDA I. STARREN, *Respondent*.

RECALL OF REMITTITUR OPERATES AS A
PETITION FOR REHEARING ON SPECIAL
GROUNDS WITHOUT TIME LIMITATIONS

If a remittitur issues by mistake, the Appellate Court has an inherent power to recall it and thereby reassert its jurisdiction over the cause. (See 6 Witkin, *California Procedure, Appeal*, §521, and the cases cited therein.)

MISTAKE OF FACT OR "IMPROVIDENT ORDER"
ARE GROUNDS FOR RECALL OF REMITTITUR

If an Appellant Court determines that a judgment was rendered unintentionally and inadvertently by reason of the Court's own mistake of fact, the remittitur may be recalled. (See 6 Witkin, *California Procedure, Appeal*, §524, and the cases cited therein.)

THE INTENT OF CONGRESS IS THAT RAILROAD
RETIREMENT BENEFITS REMAIN THE SEPARATE
PROPERTY OF THE EMPLOYEE

In *Hisquierdo v. Hisquierdo* (1979) 39 CCH St.Ct.Bull. p. B860, the United States Supreme Court held benefits payable under the Railroad Retirement Act may not be divided under the community property law of the State of California. The judgment of the California Supreme Court *In re Marriage of Hisquierdo* (1977) 19 C 3d 613, was reversed and the case was remanded for further proceeding not inconsistent with the United States Supreme Court opinion. The United States Supreme Court held that ordering the employee to pay his wife an appropriate portion of his retirement benefits under the Act, or its monetary equivalent, would deprive the employee of the benefit Congress intended for the employee alone. The Court said 45 U.S.C. §231 was designed to protect the benefits from legal process "notwithstanding any other law . . . of any State," and ensured that the benefits would reach the beneficiary. The Court held section 231m goes far beyond garnishment and makes no exception for a spouse. The Court further held that an offsetting award to the wife for the

expected value of the employee's statutory benefits would likewise defeat the purpose of barring the anticipation of payments under §231m of the Act.

The California Supreme Court in its opinion on the *Hisquierdo* case at page 616 recognized that military annuities had similar provisions to section 231m, that is, 45 U.S.C. §231m was similar to 10 U.S.C. §1440. The California Court indicated that the plaintiff wife was not a creditor, but an owner. However, the United States Supreme Court does not agree.

A review of the federal law dealing with military retirements indicates Congress has spoken more forcefully in regard to military retirement [to the effect that retired pay is separate property] than in the Railroad Retirement Act. An analysis of such federal law is dealt with in an excellent article by Judge B. Abbott Goldberg entitled "Is Armed Services Retirement Pay Really Community Property?" found in the January-February 1973 issue of the *California State Bar Journal*, Volume 48, No. 1, page 12. Judge Goldberg finds Congressional intent to disregard community property and hold such pay as separate property in the following: (1) federal statutes on retired pay contain no words such as "child," "wife" or "administrator" indicating family relationship; (2) no part of the retirement pay (with the possible exception of arrears in pay) passes to the family when a military person dies; (3) the right of the serviceman to designate the beneficiary of any unpaid or unreceived retired pay upon his death; (4) the statutory right of the serviceman to waive all retired pay to receive a pension from the Veterans' Administration; (5) the adoption of the Retired Serviceman's Family Protection Plan which provides for an annuity to a "widow" of the serviceman

as a "qualified beneficiary," but not to a surviving ex-wife, and for the cessation of reduction in the retired pay if and when a "qualified beneficiary" ceases to be qualified because of divorce; and (6) the adoption of the Survivor's Benefit Plan in which the annuity elected to be given a serviceman's widow is terminated by her remarriage. Remarriage should not terminate the retired pay, if such retired pay is, in fact, community property.

In 42 U.S.C. §659 the United States consented to garnishment and similar proceedings for enforcement of child support and alimony obligations. There is no such provision for enforcement of rights in and to community property rights.

Respectfully submitted,

Norvin L. Grauf, Attorney
for Appellant

COURT OF APPEAL—STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

FILED February 16, 1979

Robert L. Ford, Clerk

R. J. Smith, Deputy Clerk

4 Civil No. 16339

SUPERIOR COURT NO. D 56045

IN RE: MARRIAGE OF QUINTEN T.
and HILDA I. STARREN.

BY THE COURT:

Appellant's motion to recall remittitur is denied.

Cologne
Acting Presiding Justice

Copies to: Norvin L. Grauf, Esq.-SD
Bryan & Johns-Chula Vista
Superior Court-SD